

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**Kuburoski v Minister for Immigration, Citizenship and Multicultural
Affairs [2024] FedCFamC2G 92**

File number: SYG 2630 of 2018

Judgment of: **JUDGE LADHAMS**

Date of judgment: 9 February 2024

Catchwords: **MIGRATION** – application for judicial review of a decision of the Administrative Appeals Tribunal affirming a decision not to grant the applicant a partner visa – whether the Tribunal failed to consider each of mandatory considerations set out in reg 1.15A of the *Migration Regulations 1994* (Cth) – whether the Tribunal made a finding that was illogical or irrational – whether the Tribunal failed to comply with the requirements of s 359AA of the *Migration Act 1958* (Cth) – jurisdictional error established – writs issued.

Legislation: *Migration Act 1958* (Cth) ss 5CB, 5F, 359AA, 359A, 424A, 476, 477
Migration Regulations 1994 (Cth) cll 820.211, 820.221, reg 1.15A

Cases cited: *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; [2020] HCA 34
Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 236 FCR 593; [2003] FCAFC 184
Campos v Minister for Immigration and Border Protection [2019] FCA 1791
Duncan v Independent Commission Against Corruption [2016] NSWCA 143
He v Minister for Immigration and Border Protection (2017) 255 FCR 41; [2017] FCAFC 206
Li v Minister for Immigration and Citizenship (2008) 102 ALD 354; [2008] FCA 90
Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421; [2019] HCA 3
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16

Nathanson v Minister for Home Affairs (2022) 178 ALD 536; [2022] HCA 26

Singh v Minister for Home Affairs (2019) 267 FCR 200; [2019] FCAFC 3

Singh v Minister for Immigration and Border Protection (2017) 159 ALD 442; [2017] FCA 1298

Springs v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2021) 389 ALR 431; [2021] FCA 197

SZBYR v Minister for Immigration and Citizenship (2007) 96 ALD 1; [2007] HCA 26

SZMCD v Minister for Immigration and Citizenship (2009) 174 FCR 415; [2009] FCAFC 46

SZMTJ v Minister for Immigration and Citizenship (No 2) (2009) 232 FCR 282; [2009] FCA 486

Division:	Division 2 General Federal Law
Number of paragraphs:	129
Date of hearing:	7 March 2023
Place:	Perth (via Microsoft Teams)
Counsel for the Applicant:	Mr P Knowles KC
Solicitor for the Applicant:	Supreme Justice Lawyers
Counsel for the First Respondent:	Ms K Hooper
Second Respondent:	Submitting appearance, save as to costs
Solicitor for the Respondents:	Mills Oakley Lawyers

ORDERS

SYG 2630 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: JOVAN KUBUROSKI
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE LADHAMS

DATE OF ORDER: 9 FEBRUARY 2024

THE COURT ORDERS THAT:

1. A writ of certiorari issue to quash the decision made by the second respondent on 14 August 2018.
2. A writ of mandamus issue, directed to the second respondent, requiring it to reconsider according to law the application for review before it.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LADHAMS:

INTRODUCTION

- 1 The applicant is a non-citizen who applied for a Partner (Temporary) (Class UK) visa (partner visa). A delegate of the Minister made a decision not to grant the applicant a partner visa and that decision was affirmed by the Administrative Appeals Tribunal (Tribunal) on 14 August 2018. The application before the Court is an application filed under s 476 of the *Migration Act 1958* (Cth) (Migration Act) by which the applicant seeks judicial review of the Tribunal decision.
- 2 The applicant relies on an amended application asserting jurisdictional error on the basis that:
- (a) the Tribunal failed to have regard to mandatory relevant considerations, namely, all of the circumstances of the relationship between the applicant and his sponsor, including those enumerated at reg 1.15A(3) of the *Migration Regulations 1994* (Cth) (Regulations) (ground 1); and
 - (b) the Tribunal's conclusion was premised on a material finding of fact, or a material course of reasoning, that was unreasonable, illogical and irrational (ground 3); and
 - (c) the Tribunal failed to comply with the requirements of ss 359A and 359AA of the Migration Act, by failing to ensure, so far as reasonably practicable, that the applicant understood why particular information provided by the sponsor was relevant to the review and the consequences of the information being relied on (ground 4).
- 3 For the reasons explained below, I have found that the applicant has, by grounds 1 and 3, established that the Tribunal decision is vitiated by jurisdictional error. I therefore issue a writ of certiorari to quash the Tribunal decision and a writ of mandamus to require the Tribunal to reconsider the review application according to law.

VISA APPLICATION AND DECISIONS

- 4 The applicant is a non-citizen who arrived in Australia in November 2015 and applied for the partner visa on 14 January 2016. The applicant made the application for a partner visa on the basis of his relationship with his sponsor, Ms Mojsovski, who he married on 19 December 2015.

5 On 10 May 2017 a delegate of the Minister refused to grant the applicant a partner visa. The
delegate was not satisfied that the applicant met the definition of spouse or de facto partner in
ss 5F or 5CB of the Migration Act and therefore found that the applicant did not meet the
requirements of cl 820.211 in Schedule 2 Regulations.

6 On 17 May 2017 the applicant applied to the Tribunal for review of the delegate's decision.

7 On 1 August 2018 the applicant, the sponsor and two witnesses attended a hearing convened
by the Tribunal to give evidence and, in the applicant's case, present arguments.

8 On 14 August 2018 the Tribunal affirmed the delegate's decision.

SUMMARY OF TRIBUNAL DECISION

9 The Tribunal was satisfied that the applicant and the sponsor were validly married to each
other for the purposes of s 5F(2)(a) of the Migration Act.

10 The Tribunal recognised that in assessing whether the applicant satisfied the requirements of
s 5F(2)(a)-(d) of the Migration Act, it was required to have regard to all of the circumstances
of the relationship, including those factors set out in r 1.15A(3) of the Regulations.

11 The Tribunal considered the financial aspects of the relationship and, based on the evidence
before it, was not satisfied that the financial aspects of the relationship were indicative of a
spousal relationship. The Tribunal found that the records provided by the applicant of the
joint bank account he shared with the sponsor did not substantiate that the applicant and the
sponsor had pooled their financial resources and found that they had no joint debts. The
Tribunal acknowledged that couples may choose to maintain their assets separately, but found
that the applicant and the sponsor did not provide any evidence to demonstrate that they had
done so for any particular reason.

12 The Tribunal was not satisfied that the social aspects of the relationship indicated a spousal
relationship. The Tribunal accepted that the applicant and the sponsor provided consistent
evidence about their outings. The Tribunal considered witness statements and evidence given
by family and friends of the applicant and sponsor and accepted that the witnesses believe
that the relationship is genuine. However, the Tribunal was concerned that one witness gave
inconsistent evidence in relation to where the applicant and the sponsor met and found the
evidence of the sponsor's father to be evasive.

- 13 The Tribunal accepted that the evidence that the applicant and sponsor provided about the nature of their household, including in relation to their living arrangements and division of household chores, was consistent with the relationship claimed.
- 14 The Tribunal considered the nature of the applicant's and the sponsor's commitment to each other and was prepared to accept that the applicant and the sponsor provided some companionship and emotional support to each other. However, the Tribunal expressed concern about the evidence given by the applicant and the sponsor in relation to the inception of the relationship and the short amount of time between when they met and when they married, and considered that the explanations given did not ring true. The Tribunal was therefore not satisfied that the applicant and the sponsor were committed to the relationship.
- 15 The Tribunal then offered the following overall assessment of the relationship at [46] of its reasons:

The Tribunal accepts people enter relationships for different reasons and that this does not preclude a relationship being genuine and the Tribunal acknowledges that some of the evidence presented is indicative of a spousal relationship. However, overall given the concerns regarding the financial and social aspects of the relationship and in relation to their commitment to the relationship, the inconsistent evidence put at hearing and the short time the parties claimed to have known each other before they decided to marry, as well as the evidence of the witnesses which either contradicted the claims, or in the case of the sponsor's father appeared evasive have resulted in the Tribunal being unable to be satisfied that the parties have a mutual commitment to a shared life to the exclusion of others or that they are in a genuine and continuing relationship and intend to not live separately and apart on a permanent basis.

- 16 The Tribunal found that the applicant did not satisfy the requirements of s 5F(2) of the Migration Act and therefore did not meet the criteria in cl 820.211(2)(a) and 820.221 in Schedule 2 to the Regulations for the grant of the partner visa.

JUDICIAL REVIEW APPLICATION

- 17 The application for judicial review was filed on 11 September 2018, and was made within 35 days of the date of the Tribunal decision, as required by s 477(1) of the Migration Act.
- 18 By amended application filed on 7 August 2019, the applicant advances four grounds of application. The grounds are set out under separate hearings below. In his written submissions, the applicant indicated that ground 2 is entirely encapsulated within ground 1 and is not separately pressed. I therefore do not separately address ground 2 of the application.

- 19 The evidence before the Court comprises:
- (a) the court book; and
 - (b) an affidavit of Talha Zubair Batt affirmed on 7 August 2019 and filed on behalf of the applicant, which annexes a transcript of the hearing convened by the Tribunal on 1 August 2018.
- 20 The applicant also filed an affidavit of Mary Mojsovski affirmed on 5 August 2019 which annexes various medical records relating to treatment to conceive a child. The Minister objected to this evidence on the basis that it is irrelevant. Counsel for the applicant submitted that the relevance of the affidavit was that it shows the evidence that the applicant could have provided to the Tribunal had the Tribunal complied with its requirements under s 359A of the Migration Act, and is filed to address any submission that any error in the approach to s 359A is not material. As will be seen from the grounds addressed below, the alleged jurisdictional error based on a failure to comply with the requirements of ss 359A and 359AA of the Migration Act related to information from a witness about where the applicant and the sponsor met, not the desire of the applicant and the respondent to conceive a child. Counsel for the applicant submitted that the affidavit could be relevant to materiality because, had the relevance of the inconsistency between the evidence of the witness and the evidence of the applicant and the sponsor been explained to the applicant, the applicant might have submitted that, even if there was an inconsistency, it was on such a minor and trivial issue that no weight should be placed on it, and the medical records regarding fertility treatment could have been provided as further evidence of the genuineness of the relationship. In response, Counsel for the Minister submitted that the information in the affidavit is not responsive to the information that the Tribunal put to the applicant in relation to the witness's evidence of where the applicant and the sponsor met. I indicated to the parties at the hearing that I would rule on the objection in my written reasons.
- 21 I do not accept that Ms Mojsovski's affidavit is admissible in this proceeding, even for the limited purpose of showing what evidence the applicant or the sponsor could have provided to the Tribunal if it is established that the Tribunal failed to comply with s 359AA of the Migration Act. The affidavit does not indicate that the sponsor or the applicant would have or might have provided this evidence in response to the information that the Tribunal considered that it was required to put to the applicant under ss 359A or 359AA and there is no obvious

connection between the evidence in Ms Mojsovski's affidavit and the matters raised by the Tribunal in purported compliance with s 359AA.

GROUND 1

22 Ground 1 reads:

The Tribunal failed to have regard to mandatory relevant considerations.

Particulars

- a. Section 5F(3) of the *Migration Act* 1958 (Cth) (the **Act**) relevantly provided that regulations may make provision in relation to the determination of whether one or more of the conditions s 5F(2) of the Act exist.
- b. Regulation 1.15A of the *Migration Regulations* 1994 (Cth) (the **Regulations**) is made pursuant to s 5F(3) and 504 of the Act.
- c. Pursuant to r 1.15A(2) of the Regulations the Tribunal was required to consider all of the circumstances of the relationship between the Applicant and his sponsor including the matters enumerated in r 1.15A(3).
- d. Consideration of all the circumstances of the relationship between the Applicant and his sponsor required the Tribunal to make findings in relation to all relevant circumstances of the relationship, including findings in relation to all of the matters enumerated in r 1.15A(3): *He v Minister for Immigration and Border Protection* [2017] FCAFC 206.
- e. The Tribunal referred to the matters enumerated in r 1.15A(3), but failed to make findings in relation to all of those matters:
 - i. in relation to the matters in r 1.15A(3)(a), the Tribunal recited the evidence before it, and commented on the documentary evidence, but made no findings except in relation to the matter in r 1.15A(3)(a)(ii);
 - ii. further in relation to the matters in r 1.15A(3)(a), the Tribunal failed to consider and make findings in relation to whether the Applicant's evidence that he makes no claim on the sponsor's assets was indicative of a genuine relationship in that, were his evidence to be accepted, it could demonstrate love and commitment on the part of the Applicant as opposed to a desire for material gain from the relationship;
 - iii. in relation to the matters in r 1.15A(3)(c), the Tribunal recited the evidence before it, but made no findings;
 - iv. further in relation to the matters in r 1.15A(3)(c), the Tribunal accepted that the witnesses who provided letters and statements believe the relationship is genuine, but failed to make findings as to with this finding (and any other relevant evidence) established that:
 1. the Applicant and the sponsor represented themselves to other people as being married; and
 2. the friends and acquaintances of the of the Applicant and the

sponsor, including *but not limited* to the persons who provided letters and statements, hold any opinion as to the nature of the relationship;

- v. in relation to the matters in r 1.15A(3)(d), the Tribunal recited the evidence before it, but made no findings;
- vi. further in relation to the matters in r 1.15A(3)(d), the Tribunal accepted that the parties to the relationship provide some level of companionship and support to each other, but made no finding as to the nature and extent of such companionship and support, and the degree to which the provision of such companionship and support fulfilled the respective desires of the applicant and the sponsor: *Singh v Minister for Immigration and Border Protection* [2017] FCA 1298.
- f. A relevant circumstance of the relationship for the purposes of r 1.15A(2) was that the Applicant and the sponsor shared a common Macedonian cultural heritage. The Tribunal failed to consider this circumstance and failed to make any findings in relation to this consideration.
- g. A relevant circumstance of the relationship for the purposes of r 1.15A(2) was the Applicant's claim that he and the sponsor wanted to have a child together. The Tribunal made no finding in relation to the desire and attempts of the Applicant and the sponsor to have a child: *Li v Minister for Immigration & Citizenship* [2008] FCA 902.

23 Counsel for the applicant advised the Court at the hearing that particular (f) is not pressed.

Relevant legislation and case law

24 Before summarising and considering the parties' submissions, it is expedient to set out the legislation and summarise the case law on which this ground is based.

25 In reaching its decision, the Tribunal was required to consider whether the applicant was the spouse or de facto partner of the sponsor at the time of the visa application and at the time of the Tribunal decision: see cl 820.211(2)(a) and 820.221 in Schedule 2 to the Regulations.

26 The term 'spouse' is defined in s 5F of the Migration Act, which provides:

- (1) For the purposes of this Act, a person is the **spouse** of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a **married relationship** if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:

- (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

27 In considering whether the requirements of s 5F(2)(a)-(d) are met, the Tribunal was required to ‘consider all the circumstances of the relationship, including the matters set out in [subreg 1.15A(3)]’: see reg 1.15A(1) and (2) of the Regulations. Subregulation 1.15A(3) provides:

The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons’ friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons’ commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and

- (iii) the degree of companionship and emotional support that the persons draw from each other; and
- (iv) whether the persons see the relationship as a long term one.

28 The Full Court of the Federal Court (Siopis, Kerr and Rangiah JJ) considered the Tribunal's obligation to consider the matters referred to in reg 1.15A in *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41; [2017] FCAFC 206 (*He*). The Court held that the Minister (and, it follows, the Tribunal on review) is required to consider each of the four principle matters in reg 1.15A(3)(a)-(d), each of the 15 specific matters identified by roman numerals, and any other relevant circumstances of the relationship: *He* at [50].

29 The Court considered the requirement to 'consider' these matters at [76]-[77] and held:

76. In our opinion, the requirement that the Tribunal "consider" the circumstances in reg 1.15A(3) means that the Tribunal is required to make findings upon each of the prescribed matters numbered with Roman numerals. The nature of these specific matters is such that each of them poses, in effect, a question or questions for the Tribunal....

The regulation poses these questions in order to ensure that the Tribunal takes into account particular circumstances of the marriage as part of the active mental process involved in giving proper, genuine and realistic consideration to the prescribed matters. The legislative intention must be that these questions will be answered, not merely thought about. They must be answered so that the circumstances identified by the answers are included in the evaluation of whether there is a "married relationship". In some cases, the Tribunal's answer may be that there is no material, or insufficient material, to be able to form a conclusion on a prescribed matter: cf *Paerau v Minister for Immigration and Border Protection* (2014) 219 FCR 504] at [27], [69] and [119]. However, there must be an answer, or, in other words, a finding, even if the finding is that no conclusion can be reached upon the matter.

77. So far, we have discussed the requirement for the Tribunal to make findings in respect of the specific matters in reg 1.15A(3) numbered with Roman numerals. It is also necessary to consider whether findings are required in respect of the principal matters in paras (a) to (d), namely the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other. These matters are expressed broadly and it is less obvious that they pose questions that are required to be answered. Nevertheless, they should be seen as doing so, having regard to the questions that are then immediately posed in connection with each of the principal matters. In our opinion, the requirement to "consider" the principal matters means that a decision-maker must make findings upon each of them. In many cases, the requirement to make findings upon the principal matters may be satisfied by the course of making findings upon the specific matters. For example, the Tribunal may make a finding that the nature of the household is one where the parties have no children, they live together and they share responsibility for housework equally.

30 In assessing whether the Tribunal ‘considered’ all relevant matters specified by reg 1.15A(3), I also take into account further principles identified in *He* (see also, *Campos v Minister for Immigration and Border Protection* [2019] FCA 1791 (*Campos*) at [35], [37]), including that:

- (d) the Tribunal’s reasons did not need to be structured in a manner that formulaically addressed each of the relevant matters in turn: *He* at [82];
- (e) the Tribunal was not required to refer to or make findings upon every piece of evidence, and was rather required to make findings about the *matters* prescribed by reg 1.15A(3): *He* at [83]; and
- (f) the findings of the Tribunal may be inferred rather than express: *He* at [85].

31 In some cases, where the Tribunal’s decision ‘record indicates no rejection of the evidence advanced by a party, it is reasonable to infer that such material has been accepted’: *Campos* at [41].

Did the Tribunal fail to have regard to all of the matters in reg 1.15A(3)?

32 Both parties accept that the Tribunal referred to the matters set out in reg 1.15A(3). However, the parties differ in their submissions as to whether the Tribunal considered these matters, in the manner required by *He*.

33 Broadly speaking, the applicant submitted that in relation to many matters, the Tribunal simply recited evidence without making a finding. While the applicant acknowledged that the Court may find that the Tribunal made findings in relation to some of the matters even if the findings were not expressly articulated, the applicant submitted that an inference that mandatory considerations were in fact considered, despite not being expressly articulated, can be more readily drawn where the Tribunal’s reasons are otherwise comprehensive, citing *Applicant WAE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC 184 at [47]. The applicant submitted that the Tribunal’s reasons in this case were not comprehensive.

34 The Minister submitted that the Tribunal engaged in the required active, intellectual exercise and its reasons reflect that it addressed the specific matters so as to inform its consideration of the principle matters. Citing *Singh v Minister for Immigration and Border Protection* (2017) 159 ALD 442; [2017] FCA 1298 at [20], the Minister submitted that the Court may take into account the impressionistic and evaluative nature of the Tribunal’s task when drawing

implications from its reasons, and the Tribunal's reasons are not to be construed minutely and finely with an eye attuned to the perception of error.

35 As can be seen from the particulars to this ground, the applicant asserts that the Tribunal failed to have regard to all of the required matters in relation to reg 1.15A(3)(a), (c) and (d).

36 I consider each of these in turn. As will be seen from the discussion below:

- (g) I have accepted that where the Tribunal has referred to evidence without indicating that it rejected or had concerns with that evidence, it can be inferred that the Tribunal accepted the evidence, consistent with the approach accepted in *Campos* at [41].
- (h) I have understood many of the Tribunal's findings to be inferred or implicit, rather than express. This is consistent with *He* at [85].
- (i) In some cases, I have found that the Tribunal reference to the absence of evidence, or its statement that evidence does not establish something, to be a relevant finding, consistent with what the Full Court suggested was sometimes permissible in *He* at [76].
- (j) I have taken into account, and I consider it to be relevant (but not determinative), that in its discussion of each of reg 1.15A(3)(a)-(d), the Tribunal expressly acknowledged each of the specific matters to which it was required to have regard.

Regulation 1.15A(3)(a): the financial aspects of the relationship

37 The applicant submitted that:

- (k) The Tribunal noted the applicant's oral evidence that, upon his marriage, the sponsor took a joint interest in his farm in Macedonia, and that he had no evidence of joint ownership, but it did not make any finding rejecting the applicant's oral evidence and did not make an overall finding as to the applicant and sponsor's joint ownership of real estate or other major assets, as required by reg 1.15A(3)(a)(i).
- (l) The Tribunal did not express findings made in relation to the pooling of financial resources, whether a person owes a legal obligation to the other and the basis for sharing day to day expenses, as required by reg 1.15A(3)(a)(iii)-(v). The Tribunal described bank statements and other documentation provided by the applicant and the sponsor and stated in some places that some of this documentation alone did not prove that the expenses were shared or that the expenses were for a joint household expense, but did not go further and make any final conclusions. The Tribunal also did not seek

to synthesis the evidence regarding shared ownership and joint ownership of assets. As an example of this, the applicant referred to the fact that the Tribunal did not seek to reconcile the fact that a car was registered in the applicant's name, yet car expenses were paid from the sponsor's account and did not express a view as to what this state of affairs might mean for the financial aspects of the relationship.

38 The Minister submitted that:

- (m) The Tribunal considered the evidence bearing on the financial aspects of the relationship in detail and, having done so, concluded that it was unable to be satisfied as to the financial aspects of the applicant's and the sponsor's relationship. The Tribunal's reasons demonstrate that it expressly considered the evidence bearing on each of the specific matters and, having undertaken that consideration, it was not satisfied that the financial aspects of the relationship demonstrated its genuineness. The Tribunal's ultimate conclusion was in effect that there was insufficient material to enable it to be satisfied, and this is sufficient.
- (n) The Tribunal made an express finding in relation to the pooling of financial resources and made findings concerning shared expenditure. The applicant and sponsor did not provide evidence or submissions to the Tribunal that they owed legal obligations to one another. The Tribunal expressed a 'final conclusion' in terms of its state of non-satisfaction. The Tribunal was not required to resolve to finality each and every detail of the parties' claimed financial affairs.
- (o) The Tribunal made a finding concerning each of the applicant's and sponsor's properties, those properties being items of real estate maintained in individual names. The Tribunal found that there was no particular reason for maintaining the properties in individual names. The Tribunal acknowledged the evidence of the applicant and the sponsor in relation to the registration of the car and the explanation advanced. On the Tribunal's finding, the car did not fall into the category of a major asset separately maintained. Although the applicant was the registered operator of the car and the person identified in the insurance policy, the sponsor made contributions to the upkeep of the car. It should be inferred that the Tribunal found there was no satisfactory evidence of joint ownership of real estate or major assets (being, relevantly, the real estate and the bank accounts) and no satisfactory evidence of any pooling of financial resources, especially in relation to major financial commitments.

39 I accept that, in reaching a view for the purposes of reg 1.15A(3)(a) that the financial aspects of the relationship do not support a finding that the applicant is the ‘spouse’ of the sponsor for the purposes of s 5F of the Migration Act, the Tribunal considered each of the specific matters it was required to consider.

40 In relation to the joint ownership of real estate or other major assets, the Tribunal summarised the evidence of the applicant and the sponsor in relation to real properties that they own. The Tribunal acknowledged the applicant’s evidence that he owned a farm in Macedonia and that, upon his marriage, the sponsor came to jointly own the property. However, the Tribunal also noted that the applicant had not provided evidence to support this. When read in conjunction with the Tribunal’s reference at [20] to the applicant and sponsor ‘maintain[ing] assets separately’, I am satisfied that it can be implied from the Tribunal’s reasons that it accepted the applicant had real property in Macedonia, but was not satisfied on the evidence before it that the property became jointly owned upon the marriage of the applicant and the sponsor. I acknowledge the submission advanced by Counsel for the applicant at the hearing that it may not be accurate for the Tribunal to say that there was no evidence of joint ownership, given that the applicant was himself giving sworn evidence when he claimed that the property became jointly owned upon marriage, but this submission does not alter my view of the Tribunal’s finding. It is tolerably clear, given that the Tribunal expressly referred to the evidence of the applicant, that the Tribunal’s reference to there being no evidence to support the applicant’s contention was a reference to the lack of corroborative evidence.

41 The Tribunal also summarised the evidence before it in relation to real property owned by the sponsor and referred to the applicant’s evidence that he does not make any claim on the sponsor’s property. In the absence of any indication that the Tribunal rejected this evidence, and again, in the light of the Tribunal’s reference to the applicant and the sponsor maintaining assets separately, I infer that the Tribunal accepted that the sponsor has real property in Australia that is not jointly owned by the applicant. I am satisfied that the Tribunal considered and made findings in relation to the specific matter referred to in reg 1.15A(3)(a)(i).

42 It is convenient to address together the pooling of financial resources and the basis on which the applicant and the sponsor share day-to-day expenses. The Tribunal referred to documentary evidence that the applicant and the sponsor opened a joint bank account, which was opened in December 2017. The Tribunal expressed a concern, which raised with the applicant and the sponsor, that the evidence did not show how the account was being used

and referred to the evidence they gave in response. The Tribunal expressly found that ‘[t]he records of expenditure in relation to their joint bank account did not substantiate that they have pooled their financial resources’. The Tribunal considered the various other bank statements before it and expressly accepted that the sponsor is the account holder of a Mastercard account and that the highlighted transactions from the statement provided to the Tribunal relate to the car or expenditure of the applicant and the sponsor. The Tribunal also referred to the evidence given by the applicant that the sponsor had a separate bank account and he did not know how she used it, and evidence that the Mastercard account was used for day-to-day expenses. In the absence of any indication that this evidence was rejected, I infer that the Tribunal accepted this evidence. The Tribunal considered receipts provided to it and expressly accepted that the items referred to in the receipts were purchased by the sponsor but found that the receipts did not show that the purchased goods were used within the relationship or that the expenses were paid for jointly.

43 It is apparent from the Tribunal’s reasons that it considered the evidence provided by the applicant and the sponsor and was not satisfied that this evidence showed that they were pooling their resources. The Tribunal therefore made a finding for the purposes of reg 1.15A(3)(a)(iii). The Tribunal referred to evidence and made express and implied findings about how the applicant and sponsor pay for their day-to-day expenses, and these findings were sufficient to show consideration of the specific matter in reg 1.15A(3)(a)(v).

44 I deal separately with the evidence in relation to the car. The Tribunal referred to evidence that a car was registered in the applicant’s name and referred to the insurance policy provided to it in relation to the car, which was also in the applicant’s name. The Tribunal referred to the evidence of the applicant and the sponsor that the car was registered in the applicant’s name because the sponsor held a learner’s permit and insurance would be more expensive if the car was in her name. In the absence of any indication to the contrary, I infer that the Tribunal accepted this evidence. The Tribunal expressly accepted that transactions on the Mastercard statement, in relation to an account in the sponsor’s name, related to the car. It can be inferred from a fair reading of the Tribunal reasons that the Tribunal accepted that the car was registered in the applicant’s name and that the sponsor made contributions to the payments relating to the car.

45 These findings in relation to the car are relevant to the day-to-day sharing of expenses. A question arose based on the parties’ submissions as to whether the Tribunal considered the car

to be a major asset for the purposes of reg 1.15A(3)(a)(i). The Minister submitted that on a fair reading of the Tribunal reasons, the car did not fall into the category of a major asset separately maintained. Counsel for the applicant submitted that whether a car is a major asset is a relative assessment and, in any event, one that is for the Tribunal to determine.

46 I do not consider that anything turns on the Tribunal's characterisation of whether the car was a major asset for the purposes of this ground. I have accepted above that the Tribunal found that the car was registered in the applicant's name and that the sponsor made some payments toward car expenses. This amounts to a finding that is relevant to both reg 1.15A(3)(a)(i) and (v). The relevance of the submissions on the Tribunal's characterisation of whether the car is a major asset relates to the applicant's submission that the Tribunal's finding, stating that the applicant and the sponsor did not provide evidence that they had maintained separate assets for any particular reason, overlooks the explanation in relation to why the car is registered in the applicant's name. This finding was made in the Tribunal's conclusion in relation to the financial aspects of the relationship at [20], where the Tribunal said:

The Tribunal understands that couples may choose to maintain assets separately in certain circumstances, however, in relation to the parties they did not provide evidence that they had done so for any particular reason. The records of expenditure in relation to their joint bank account did not substantiate that they have pooled their financial resources. Based on the evidence before the Tribunal could not be satisfied as to the financial aspects of the parties' relationship

47 I understand this paragraph to be a brief summary of the Tribunal's overall assessment of the financial aspects of the relationship. I do not understand the reference to 'maintain[ing] assets' to be limited to major assets and instead amounts to an acknowledgement that the majority of assets owned by either or both of the applicant and the sponsor were held separately. In circumstances where the Tribunal elsewhere acknowledged, and appears to have accepted, the explanation as to why the car is registered in the applicant's name, I do not consider that the Tribunal's failure to refer to it at [20] demonstrates jurisdictional error.

48 I am not satisfied that the Tribunal considered the matter referred to in reg 1.15A(3)(iii), namely, whether the applicant and the sponsor have any legal obligations to one another. The Tribunal acknowledged that it was required to consider this but then did not make any express or implied findings in relation to this factor.

49 The parties have not identified any evidence that was before the Tribunal that demonstrated any legal obligation that either the applicant or the sponsor owed to one another. On the basis of *He*, if the Tribunal had simply acknowledged that there was no evidence of any legal

obligation, or that there was insufficient evidence to enable it to make a finding, this would be sufficient to amount to a finding and show that the Tribunal considered the matter. But it did not and this amounts to an error on the part of the Tribunal.

50 However, of itself, in circumstances where there was no evidence before the Tribunal that the applicant or the sponsor had any legal obligation to the other, the Tribunal's failure to consider whether the applicant or the sponsor had a legal obligation to the other could not realistically have deprived the applicant of the possibility of a successful outcome and is therefore not material: see *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 at [3], [45] (Bell, Gageler and Keane JJ). The Tribunal's failure to consider whether the applicant or the sponsor owe legal obligations to the other therefore does not, of itself, amount to a jurisdictional error.

51 Before turning from this part of ground 1, I also note that the applicant submitted that the Tribunal erred by failing to consider whether the applicant's evidence that he did not make any claim on the sponsor's assets could be indicative of a genuine and loving relationship. I do not accept that this amounts to a failure to consider a mandatory relevant consideration. In considering the financial aspects of the relationship, the Tribunal was required to consider each of the specific matters identified in reg 1.15A(3)(a)(i)-(v) and make an evaluative judgment. Except as indicated above, the Tribunal did that in the present case. The Tribunal was not required to conduct the evaluative judgment in any particular way. Regulation 1.15A(3)(c): the social aspects of the relationship

52 The applicant submitted that the Tribunal recited the evidence before it but failed to make findings in relation to the matters in r 1.15A(3)(c)(i)-(iii). The Tribunal accepted that the witnesses who provided letters and statements believe the relationship is genuine, but it failed to make a finding on whether this established that the applicant and the sponsor represented themselves to other people as being married. The Tribunal also made no express findings as to whether friends and acquaintances of the applicant and the sponsor hold any opinion as to the nature of the relationship.

53 The Minister submitted that the Tribunal's reasons reveal a detailed consideration of the evidence bearing on this principal matter and that the Tribunal then concluded that it was unable to be satisfied as to the social aspects of the parties' relationship. The Tribunal's reasons demonstrate express consideration of the evidence bearing on each of the specific matters. The Minister submitted that the Tribunal's acceptance that the witnesses who

provided letters and statements believe that the applicant's and sponsor's relationship is genuine carries with it implicit findings on the specific matters in reg 1.15A(3)(c)(i) and (ii). The Tribunal acknowledged that the applicant and the sponsor gave consistent evidence as to their outings and, in the absence of any rejection of the evidence, the Tribunal should be taken to have accepted it. The Minister submitted that this constitutes a finding concerning the matter in reg 1.15A(3)(c)(iii).

54 I am satisfied that the Tribunal considered each of the specific matters it was required to consider in addressing the social aspects of the relationship.

55 The Tribunal referred to and summarised the evidence provided by family and friends of the applicant and the sponsor. The Tribunal expressly accepted that the witnesses who provided letters and statements believe the relationship is genuine. I consider this to be an express finding as to the matter in reg 1.15A(3)(c)(ii), namely, the opinion of the applicant's and the sponsor's friends and acquaintances about the nature of the relationship. I also accept the Minister's submission that it is implicit in this finding that the Tribunal accepted that the applicant and the sponsor represent themselves to others as married, which is the matter the Tribunal was required to consider pursuant to reg 1.15A(3)(c)(i).

56 The Tribunal summarised the evidence of the applicant and the sponsor in relation to how they spend time together and their social outings. The Tribunal acknowledged that the applicant and the sponsor 'gave consistent evidence in relation to their outings'. In the absence of any finding to the contrary, it can be inferred that the Tribunal accepted this evidence, which goes to the specific matter the Tribunal was required to consider in reg 1.15A(3)(c)(iii).

57 The Tribunal acknowledged in its reasons that the applicant had provided some documentary evidence that attested to the genuineness of the relationship, but it expressed concerns about the evidence of the sponsor's father and one other witness and, based on those concerns, it was not satisfied that the social aspects of the relationship supported a finding that the relationship was genuine. In reaching this overall finding for the purposes of reg 1.15A(3)(c), the Tribunal considered each of the specific matters it was required to consider, although in some instances, its findings were implicit rather than express.

Regulation 1.15A(3)(d): the nature of the persons' commitment to each other

- 58 The applicant submitted that the Tribunal simply recited the evidence without making any findings in relation to that evidence, and then made a brief conclusion based on its concerns about the length of time between the couple meeting and their marriage. The Tribunal made no finding, for example, on whether the applicant and the sponsor view the relationship as a long term one.
- 59 The Minister relied on the same overarching submissions in relation to the other principle matters and further submitted that the Tribunal's finding that it was not satisfied the parties are committed to the relationship is an implicit rejection of the proposition that the parties view the relationship as a long term one. The Tribunal also found that it was not satisfied that the applicant and the sponsor had a mutual commitment to a shared life, or that they are in a genuine and continuing relationship. While these matters reflect the language of s 5F(2) of the Migration Act, they remain relevant to an assessment of whether the Tribunal addressed the specific matters in reg 1.15A(3)(d).
- 60 I am satisfied that the Tribunal's reasons demonstrate that it considered each of the matters it was required to consider for the purposes of reg 1.15A(3)(d).
- 61 While the Tribunal did not make an express finding as to the duration of the relationship, which is referred to in reg 1.15A(3)(d)(i), it is apparent from the Tribunal's reasons that it considered the duration of the relationship between the applicant and the sponsor. The Tribunal set out in some detail the evidence of the applicant and the sponsor in relation to when they met and the circumstances in relation to their marriage shortly after they first met. The Tribunal expressed its concern about 'the evidence of the inception of the relationship and the short amount of time the couple spent together when they first met and the haste in which they married when the visa applicant came to Australia'.
- 62 The Tribunal did not expressly make a finding as to the length of time the applicant and sponsor had lived together, which is the matter set out in reg 1.15A(3)(d)(ii), but it is obvious from the reasons that it considered that the applicant and the sponsor had lived together for two and a half years, because it referred to this at [44] of its reasons, albeit in the context of recording that it asked the applicant why they had not yet had a child in circumstances where they had lived together for two and a half years.

63 The Tribunal described the evidence in relation to the degree of companionship and emotional support that they provide to each other at [43] of its reasons. In the absence of any statement to the contrary, it can be inferred that the Tribunal accepted this evidence. The Tribunal then expressly found at [45] that '[t]he Tribunal is prepared to accept that the parties provide some companionship and emotional support to each other'. This is an express finding in relation to the specific matter in reg 1.15A(3)(iii).

64 I acknowledge that the Tribunal did not expressly state a finding as to whether or not the applicant and the sponsor view the relationship as a long term one. However, the Tribunal did say that it was 'not satisfied that the parties are committed to the relationship'. It is implicit in this finding that the Tribunal was not satisfied that the applicant and the sponsor saw the relationship as a long term one.

Did the Tribunal fail to have regard to all other circumstances of the relationship?

65 By particular (g), the applicant asserts that a relevant circumstance of the relationship for the purposes of reg 1.15A(2) was the applicant's claim that he and the sponsor wanted to have a child together, but the Tribunal made no finding in relation to the desire and attempts of the applicant and the sponsor to have a child.

66 I address this separately in this judgment and consider whether it was something that the Tribunal was required to consider for the purposes of reg 1.15A(2). However, I acknowledge that it can also be seen as relevant to reg 1.15A(3)(d), and it was in addressing the reg 1.15A(3)(d) matters that the Tribunal referred to the relevant evidence in its reasons. The reason that I have chosen to address it separately is because the obligation of the Tribunal in considering the reg 1.15A(3)(d) matters was to consider and make a finding on each of the matters, and not necessarily to make a finding on each item of evidence. I have found above that the Tribunal made a finding based on other evidence about the matters relevant to the nature of the commitment. But the Tribunal may still have been required to consider the evidence of the desire to have a child as part of the consideration of all of the relevant circumstances of the relationship.

67 The Federal Court (Jessup J) considered in *Li v Minister for Immigration and Citizenship* (2008) 102 ALD 354; [2008] FCA 90 (*Li*) at [24] that submissions advanced by a couple that they wished to have a baby was evidence that the Tribunal was required to identify and consider in having regard to 'all of the circumstances of the case'.

68 Counsel for the applicant identified parts of the transcript of the Tribunal hearing that showed that the applicant and sponsor gave evidence about their desire to have a child. When the applicant was asked about his and the sponsor's plans for the future together, he responded 'The first thing that we want is to have kids'. When asked why they did not already have children, the applicant explained that they were starting to go to the doctors to see what it is going on. When the sponsor was asked about the plans that she and the applicant had discussed for the future, she responded:

We want kids but [] taking more money out. So once I get my license I am going to see another doctor to see what's the best option to have kids because we want like a big family. Maybe 2 or 3 kids. He wants a daughter to be named after his mum.

69 The Tribunal at [44] of its reasons said:

The visa applicant and the sponsor stated they want to have children. The Tribunal asked the visa applicant why, given they have lived together for some two and half years they have not had a child yet. He responded that they are starting to seek medical advice as to what's going on. The sponsor stated that she is learning to drive and later they will go to see another doctor.

70 I am satisfied that the Tribunal acknowledged the evidence of the applicant and the sponsor that they wish to have a child. Counsel for the applicant submitted that the Tribunal failed to make any finding in relation to this evidence. Counsel for the Minister submitted that the evidence was impliedly rejected in the findings at [45], because the Tribunal was only prepared to accept that the applicant and the sponsor provide 'some' companionship and emotional support for each other and because the Tribunal found that the parties were not committed to the relationship.

71 I do not accept that an implied rejection of the evidence is evident from the Tribunal's findings at [45]. While that may be one construction, I do not consider it to be the only, or even the most likely, construction of the Tribunal's reasons. There is no clear indication that the Tribunal rejected the evidence about the applicant and the sponsor's plans to have a child. The Tribunal's finding that the applicant and the sponsor provide some companionship and support does not necessarily carry with it the negative connotations implicit in the Minister's submissions ('only' some). Nor does the finding that the Tribunal was not satisfied that the parties are committed to the relationship indicate that the Tribunal rejected the evidence that the applicant and the sponsor plan to have a child. It seems to be that it would be just as open to construe the Tribunal's reasons as amounting, in the absence of any clear indication to the contrary, to a finding that the Tribunal accepted the evidence that the applicant and sponsor

wish to have a baby, but that the evidence did not overcome the Tribunal's significant concerns about the inception of the relationship and the speed with which the applicant and the sponsor married.

72 Given the uncertainty in how the Tribunal reasons are properly construed, I do not accept that the Tribunal made an implied finding in relation to the evidence of the applicant and the sponsor about their desire to have a child. I accept, taking into account the reasoning in *Li*, that this was something in relation to which the Tribunal was required to make a finding. It was an important point raised by both the applicant and the sponsor. For both, the desire to have children was the first thing they referred to when asked about their future plans.

73 Had the Tribunal made a finding in relation to the evidence that the applicant and the sponsor wish to have a child together, this may have affected its overall assessment of the relationship. The error of the Tribunal is material and amounts to jurisdictional error.

Conclusion in relation to ground 1

74 Ground 1 succeeds on the basis that the Tribunal was required to, but did not, make a finding in relation to the evidence that the applicant and the sponsor wish to have a child, in performing its duty to consider 'all of the circumstances of the relationship'.

GROUND 3

75 Ground 3 reads:

The Tribunal conclusion was affected by jurisdictional error because it was premised upon a material finding of fact, or a material course of reasoning, which was unreasonable, irrational and illogical.

Particulars

- a. The Tribunal relied upon an alleged inconsistency between the evidence of the Applicant and the sponsor, on one hand, and the evidence of a supporting witness, on the other hand. The inconsistency concerned where the Applicant and the sponsor met (at [30], [31], [33] and [46]).
- b. The Tribunal accepted that the Applicant did not discuss his relationship with the sponsor with the supporting witness (at [31]).
- c. The Tribunal also held that it is not unreasonable to expect that the Applicant *might* have spoken with the supporting witness about his meeting of the sponsor (at [31]).
- d. The findings in particulars b and c above cannot be rationally reconciled – either the Applicant and the supporting witness discussed the relationship (including the circumstances of how the parties to the relationship met) or they did not.

- e. Further and in the alternative, the Tribunal's finding that it was "not unreasonable" to expect that the Applicant and the supporting witness "might" have discussed the circumstances of how the Applicant and sponsor met did not, in the absence of any more specific positive finding, does not provide an evident or intelligible justification for concluding that the evidence of the Applicant and the supporting witness was inconsistent or that the supporting witness' account of how the Applicant and the sponsor met should be preferred.
- f. Further and in the alternative, the supporting witness ultimately gave evidence that she did not know where the Applicant and the sponsor met, after having initially said "they met in Australia" (at [30]). The Tribunal made no adverse credit finding in respect of the supporting witness and made no other finding explaining a preference for the supporting witness' initial evidence over her considered evidence. In the absence of any such finding, the Tribunal's conclusion that the supporting witness gave evidence that was inconsistent with the evidence of the Applicant and the sponsor lacked any evident or intelligible justification.
- g. Further and in the alternative, the Tribunal's unreasonably failed to consider whether any inconsistency between the evidence of the Applicant and the sponsor, on one hand, and the evidence of the supporting witness on the other hand, ought be resolved in favour of the Applicant and the sponsor in circumstances where they are inherently more likely than the supporting witness to be aware of the circumstances in which they met.

Relevant findings of the Tribunal

76 This ground asserts that there is jurisdictional error evident in the Tribunal's reasoning at [30]-[31] of its reasons, when read in conjunction with its conclusions at [33] and [46].

77 At [30]-[31], the Tribunal said (emphasis from the applicant's submissions):

- 30. One of the witnesses who provided one of the statements dated 4 March 2017 also attended the hearing and provided evidence. Her husband is the visa applicant's first cousin. She stated that she has known the visa applicant for about thirty years but has grown to know him more closely over the past three years since he has been in Australia. The Tribunal asked the witness where the parties met. She stated that they met in Australia after the visa applicant came to Australia. When asked for further details, she stated that she does not really know where they met. She stated that she sees the parties approximately fortnightly and she speaks to the visa applicant by phone. She attended the wedding of the parties. She stated that they support each other and are good for each other.
- 31. The Tribunal put the inconsistency in evidence regarding where the parties met to the applicant as it is required to do by s.359AA of the Migration Act. The visa applicant repeated his previous evidence that he and the sponsor met in Ohrid, Macedonia. He stated that all tourists who visit Ohrid go there. **The applicant stated that he did not really discuss his relationship with the witness.** He said they generally talk about relatives overseas. The Tribunal would have expected that a person brought in as a witness who has a long-standing relationship with the visa applicant would have had some insights into the establishment and development of the parties' relationship that would

have helped the applicant substantiate his claims. The Tribunal found it concerning that initially as she started speaking said that the parties met in Australia and then stated that she didn't know. It raised doubts about her evidence. **The Tribunal is prepared to accept that the visa applicant does not discuss his relationship with the witness, but it is not unreasonable to expect that he might have talked about his meeting of the sponsor, especially as she is related by marriage to his cousin.**

78 The Tribunal subsequently found at [33]:

The Tribunal has had regard to all the evidence in relation to the social aspects of the parties' relationship. The Tribunal recognises that the parties have provided some written documentation attesting to the genuineness of the relationship. However, the Tribunal was concerned that the sponsor's father appeared evasive and the evidence of the other witness did not corroborate the evidence of the parties. The Tribunal acknowledges that the parties gave consistent evidence in relation to their outings. Overall the Tribunal was not satisfied as to the social aspects of the parties' relationship based on the evidence before it.

79 This reasoning also informs the Tribunal's overall assessment of the relevant matters set out at [46] of its reasons, extracted at [15] above.

Relevant evidence on which the finding was based

80 The reasoning of the Tribunal at [30] and [31] refers to a witness known to the Tribunal as 'Gula'. The transcript of the Tribunal hearing shows the following exchange between the Tribunal and Gula:

Tribunal member:	Okay so tell me um what you're understanding is about how they met and how their relationship developed?
Gula:	Um they met here.
Tribunal member:	And when did they meet?
Gula:	He came to Australia and they met here.
Tribunal member:	And how-where did they meet here? At your place or?
Gula:	No. I don't really know where they met each other.

Was the Tribunal's reasoning illogical, irrational or unreasonable?

81 The applicant submitted that there are a number of errors in the Tribunal's reasoning process, namely:

- (p) On the evidence, there was no inconsistency. The applicant and the sponsor both gave evidence that they met in Macedonia. The witness Gula initially stated that she thought the applicant and sponsor met in Australia, but subsequently corrected herself by saying that she 'does not really know where they met each other'. The Tribunal

made a vague statement that that the witness's change in position led to 'doubts' about her evidence, but it did not make any finding to the effect that her second statement was a lie and made no other finding explaining the preference for the first statement. In the absence of a clear finding as to what aspects of the witness's evidence were accepted and rejected, there was no evident or intelligible justification for the conclusion that the witness's evidence was inconsistent with the evidence of the applicant and the sponsor. In oral submissions, Counsel for the applicant submitted that even if the Tribunal had doubts about the witness's evidence as to where the applicant and the sponsor met, what is the relevance of this in circumstances where the evidence of the applicant and the sponsor was consistent.

- (q) The Tribunal accepted that the applicant 'does not discuss' his relationship with the witness, but then immediately concluded that 'it is not unreasonable to expect that he might have talked about his meeting of the sponsor'. These two propositions are difficult to reconcile. If the applicant did not discuss his relationship with the witness then it is unclear why the witness would be expected to know details about where the applicant and the sponsor met.
- (r) The use of the double negative ('not unreasonable') and the modal verb ('might') in the statement 'it is not unreasonable to expect that he might have talked about his meeting of the sponsor' means that the statement provides no support for the Tribunal's conclusion that the witness gave evidence that was inconsistent with the evidence of the applicant and the sponsor and that this was somehow important to the assessment of the relationship. That it would not be unreasonable to expect that an event might have occurred does not mean that it was probable that an event did occur. In the absence of a specific positive finding that the applicant discussed, or probably discussed, meeting the sponsor with the witness, the Tribunal's statement does not provide an evident and intelligible justification for concluding that the witness's evidence was inconsistent with the evidence of the applicant and the sponsor.
- (s) The Tribunal failed to engage in any reasoning capable of explaining why the alleged inconsistency was important to the matters to be considered by the Tribunal. The Tribunal did not make any credit findings determinative of whether or not the applicant and the sponsor's account of where they met was true. Whether the applicant and sponsor met in Macedonia or Australia was not particularly relevant to any issue before the Tribunal, save to the extent that it might be relevant to the timing

of the meeting, and the witness's understanding of where they met was of even less importance.

- 82 The applicant submitted that an error in reasoning on the part of a decision-maker may give rise to the conclusion that the decision is legally unreasonable, citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [72]. A decision on factual matters essential to the finding of a decision-maker can be reviewed on the basis that the reasoning which led to the decision was irrational or illogical irrespective of whether the same conclusion would be reached by a process of reasoning that did not suffer from the same defect: *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; [2020] HCA 34 at [122].
- 83 The Minister submitted that the Tribunal reasons do not disclose illogicality, irrationality or unreasonableness to the requisite standard identified in cases such as *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [131] and *Singh v Minister for Home Affairs* (2019) 267 FCR 200; [2019] FCAFC 3 at [61]. In response to the applicant's submissions, the Minister submitted that:
- (t) The Tribunal did not perceive the witness's evidence as involving a 'correction'. Rather, the witness gave evidence that the applicant and the sponsor had met in Australia and then, in response to a question from the Tribunal, said that she did not know with specificity where (in Australia) the applicant and the sponsor had met. The witness's evidence that the applicant and the sponsor met in Australia was clearly inconsistent with the evidence of the applicant and the sponsor that they met in Macedonia.
 - (u) The Tribunal's identification of concern with the witness's evidence, and its finding that the witness's evidence did not corroborate that of the applicant and the sponsor, were factual evaluations logically and rationally open to it. The Tribunal was not required to deconstruct the evidence of the witness and specify which assertions it accepted and rejected. It is sufficiently apparent that the Tribunal did not regard the witness's evidence as deserving of weight in the Tribunal's ultimate evaluation of the totality of the evidence.
 - (v) There is no inconsistency in the Tribunal's reasoning at [31]. The Tribunal differentiated between a discussion of the details or specifics of the relationship and

discussion of the more basic factual matter of where the parties first met, which was necessarily prior to the commencement of the relationship.

- (w) The Tribunal's reasons regarding its expectation as to the content of the evidence of a close witness called in support of the visa application are comprehensible, logical and rational. It is sufficiently plain that the Tribunal reasonably expected the applicant might have talked to the witness about his meeting with the sponsor.
- (x) The inconsistency identified in the Tribunal's reason between the evidence of the witness and that of the applicant and the sponsor was existent and open to the Tribunal, acting rationally and logically, to identify. The significance that the Tribunal gave to the inconsistency, in the context of its reasons as a whole, was a factual matter for the Tribunal within jurisdiction. This is an issue that went to the weight given to the witness's evidence, which was an assessment of fact within the Tribunal's jurisdiction.

84 Overall, I accept the applicant's submissions in preference to those of the Minister in relation to this ground and I am satisfied that the Tribunal's reasoning at [31] discloses illogicality or irrationality in its findings, notwithstanding the high bar to establish illogicality, irrationality or unreasonableness.

85 As the Tribunal acknowledged at [30] of its reasons, the witness Gula made two statements to the Tribunal about her knowledge of where the applicant and the sponsor met:

- (y) she first said that they met in Australia after the applicant came to Australia; and
- (z) she subsequently stated that she does not really know where they met.

86 It is apparent from the Tribunal's reasons at [31] that the Tribunal perceived the two statements to be inconsistent, because it found the fact that Gula made these two different statements to be 'concerning' and something which 'raised doubts about her evidence'.

87 Both parties addressed in their submissions whether there was an inconsistency in Gula's evidence, based on whether her evidence that she does not know where the applicant and the sponsor met is properly construed as a 'correction' of her earlier statement that they met in Australia, or as evidence that she does not know where in Australia they met. Both constructions would appear to be open, based on the words used in Gula's evidence, and there is some ambiguity in Gula's evidence.

88 I do not consider that the resolution of this issue would affect the conclusion that I have reached in relation to this ground. If the applicant is correct in his interpretation, then the situation would be that the Tribunal has not explained why it apparently preferred Gula's original evidence that the applicant and the sponsor met in Australia to her 'corrected' evidence that she does not know where they met, and has assessed the matter on the basis that there is an inconsistency between the evidence of the applicant and the sponsor on the one hand and Gula on the other hand where that inconsistency may not actually exist. If the Minister is correct, the Tribunal has proceeded on a fundamental misunderstanding of Gula's evidence, because it is clear from the Tribunal's reasons that the Tribunal perceived that there was an internal inconsistency in Gula's evidence. In either case, when considered together with the other matters discussed below, the manner in which the Tribunal relied on its concerns in the evidence gives rise to illogically, irrationality or unreasonableness. Given that the Tribunal did not adopt the interpretation favoured by the Minister I will not refer to that interpretation in the balance of these reasons.

89 There is an apparent contradiction in the two statements of the Tribunal, on the one hand, accepting that the applicant did not discuss the details of his relationship with the witness and, on the other hand, finding that it is not unreasonable to expect that the applicant might have talked to the witness about his meeting of the sponsor. I accept the applicant's submission that these two propositions are difficult to reconcile. In circumstances where the Tribunal accepted that the applicant did not discuss the details of his relationship with Gula it was illogical, without more, for the Tribunal to draw an adverse inference against the applicant or the witness, as it appears to have done, on the basis that Gula did not know something that it was 'not unreasonable' to expect the applicant '**might**' have discussed with her. The distinction that the Minister seeks to draw between the event of meeting, being something that occurred before the relationship commenced, and the details of the relationship after its commencement is an artificial one in the context of this matter. The inception of the relationship is a detail of the relationship.

90 The problems with the statement are compounded by the language used by the Tribunal. As the applicant submitted, that it is 'not unreasonable' to expect that the applicant 'might have' talked about his meeting of the sponsor does not amount to a finding that it is probable that the applicant spoke to Gula about meeting the sponsor. I accept the applicant's submission that in the absence of any specific positive finding that the applicant discussed (or likely discussed) meeting the sponsor with the witness, the Tribunal's statement does not provide an

evident or intelligible justification for concluding that the evidence of the applicant and the supporting witness was inconsistent, or that the supporting witness' account of how the applicant and the sponsor met should be preferred.

91 It is significant in this matter that the Tribunal has failed to identify in its reasons how and why the inconsistency it found in Gula's evidence impacted its findings in relation to the matters it was required to consider for the purposes of s 5F of the Migration Act and reg 1.15A of the Regulations. The location at which the applicant and the sponsor met is not a matter that obviously falls within any of the matters specified in reg 1.15A(3).

92 Upon identifying an inconsistency in Gula's evidence, the Tribunal did not simply rely on that internal inconsistency to reject or give no weight to Gula's evidence. Rather, without explaining its attempt to resolve the internal inconsistency in Gula's evidence that it identified, the Tribunal found that there was an inconsistency between one of the statements made by Gula and the evidence of the applicant and the sponsor, and relied on that inconsistency in finding that the social aspects of the relationship did not support a genuine spousal relationship, which in turn affected its overall assessment. I accept, as acknowledged by Counsel for the applicant, that where the parties met (to the extent that it may inform when they met) may be indirectly relevant to the length of the relationship. However, I accept the applicant's submission that that does not explain why Gula's knowledge or lack of knowledge of this was relevant.

93 The reasoning process of the Tribunal in this matter can be summarised in the following way:

- (aa) The Tribunal had before it two different statements from Gula. There may have been some ambiguity in the second statement, namely that she did not know where the applicant and the sponsor met. On one possible interpretation, namely that she did not know where they met (anywhere in the world), there was an internal inconsistency in Gula's evidence and, as the applicant submitted, the second statement could have been seen as a correction or a qualification of the first statement. On the other interpretation, namely that Gula did not know where (within Australia) the applicant and the sponsor met, there was no internal contradiction in Gula's evidence.
- (bb) The Tribunal's interpreted Gula's second statement in the way that gave rise to an internal inconsistency in her evidence. The Tribunal then expressed 'concern' about that internal inconsistency and found that it 'cast doubt' on Gula's evidence.

- (cc) The Tribunal then apparently preferred Gula's first statement, that the applicant and sponsor met in Australia, to her second statement, that she did not know where they met, but did not reject the second statement and did not give any reasons to explain why it preferred the first statement. The consequence of preferring the statement that the applicant and sponsor met in Australia was that there was then an inconsistency between Gula's evidence and that of the applicant and the sponsor.
- (dd) The Tribunal had regard to the applicant's response as to the inconsistency between Gula's evidence and the applicant and the sponsor's evidence about where the applicant and the sponsor met. The Tribunal on the one hand accepted that the applicant did not discuss the details of his relationship with Gula, and then on the other hand found that it was not unreasonable to expect that he might have discussed with Gula his meeting of the sponsor.
- (ee) The Tribunal then relied on Gula's evidence, which it expressly indicated it had doubts about, to undermine the evidence of the applicant and the sponsor in relation to the genuineness of the relationship. It did this in circumstances where it was required to consider the matters referred to in s 5F of the Migration Act and reg 1.15A of the Regulations. Where the applicant and the sponsor met is not a matter expressly referred to in this legislation. The Tribunal offered no explanation of why or how where the applicant and sponsor met was relevant to the assessment of the relevant matters it had to consider.

94 While some aspects of this decision-making process might not, considered in isolation, give rise to illogicality, irrationality or unreasonableness, when considered in combination, they reveal a decision-making process that is illogical, irrational or unreasonable. It is difficult to see how a logical and rational decision-maker could:

- (ff) rely on an inconsistency (real or perceived) in evidence that it 'doubted' and which was inconsistent with other evidence before the Tribunal, in relation to which it did not express doubt;
- (gg) to find that the decision-maker is not satisfied of a matter relevant to its statutory task (in this case, that the social aspects of the relationship did not support a finding that the applicant was the spouse of the sponsor within the meaning of s 5F of the Migration Act, and in its overall conclusion in relation to whether the applicant was the spouse of the sponsor);

- (hh) in circumstances where the ‘doubted’ evidence relied upon has no obvious relevance to the matters the Tribunal was required to consider; and
- (ii) in circumstances where, for the most part, the Tribunal’s reasons do not indicate why it treated the evidence the way it did or why it preferred one item of evidence over another, and in the one instance where it did attempt to explain why it did not accept the applicant’s explanation of the witness’s inconsistency, the Tribunal’s reasons disclose two distinct propositions that cannot be reconciled.

95 Illogicality or unreasonableness in a decision-making process can cause the Tribunal’s decision to be unreasonable. As the High Court (Hayne, Kiefel and Bell JJ) explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [72]:

The more specific errors in decision-making, to which the courts often refer, may also be seen as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that “all these things run into one another”. Further, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is “manifestly unreasonable”. Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

96 Referring to this judgment, the NSW Court of Appeal said in *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [287]:

In my opinion, the decision in *Li*, particularly with its emphasis on the fact that the power conferred on a decision-making authority must be exercised according to law and to reason and within the limit of the subject matter, scope and purpose of the statute, is consistent with the proposition that a decision on factual matters essential to the making of a finding by a decision-maker (in this case a finding of corrupt conduct), can be reviewed on the basis that the reasoning which led to the decision was irrational or illogical irrespective of whether the same conclusion could be reached by a process of reasoning which did not suffer from the same defect.

97 I am satisfied in the circumstances of the present case that the illogicality, irrationality or unreasonableness in the decision-making process led to unreasonableness in its decision.

98 Ground 3 is therefore established.

GROUND 4

99 Ground 4 reads:

The Tribunal erred by failing to comply with s 359A and s 359AA of the Act.

Particulars

- a. The Tribunal identified the evidence of Ms Gula that the Applicant and the sponsor met in Australia as information which could be the reason, or a part of the reason for affirming the decision under review.
- b. The Tribunal attempted to follow the procedure in s 359AA of the Act by giving the Applicant particulars of the evidence of Ms Gula.
- c. The Tribunal failed to comply with s 359AA of the Act because the Tribunal failed to ensure, so far as reasonably practicable, that the Applicant understood why the information was relevant to the review, and the consequences of it being relied upon.
- d. In particular, the Tribunal did not explain that Ms Gula's evidence of where the Applicant and sponsor met was relevant to determining the matters in r 1.15A(3)(c) of the Regulations dealing with "the social aspects of the relationship".
- e. By reason of the failure to comply with s 359AA, the Tribunal failed to comply with the obligation in s 359A(1) of the Act.

Relevant legislation

100 Section 359A(1) of the Migration Act sets out an obligation on the Tribunal to give to an applicant clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the delegate's decision, ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review and the consequences of it being relied on in affirming the delegate's decision, and invite the applicant to comment on or respond to the information. Where an applicant appears at a hearing before the Tribunal, the Tribunal may choose to give clear particulars of the information to the applicant orally and invite the applicant to respond, in accordance with the procedures in s 359AA of the Migration Act: see s 359A(3).

101 Section 359AA(1) provides:

- (1) If an applicant is appearing before the Tribunal because of an invitation under section 360:
 - (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) if the Tribunal does so—the Tribunal must:

- (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
- (ii) orally invite the applicant to comment on or respond to the information; and
- (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
- (iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

102 In the present case, the Tribunal purported to put information to the applicant in accordance with s 359AA(1) of the Migration Act in relation to the evidence from the witness known as ‘Gula’, whose evidence was also considered in the context of ground 3 above. By ground 4, the applicant asserts that the Tribunal failed to properly comply with the procedures set out in s 359AA(1) of the Migration Act.

Evidence of Gula and the Tribunal’s invitation to the applicant to comment on that evidence

103 The evidence of Gula on which this ground is based is the same evidence that was considered in relation to ground 3 and it is extracted at [80] above.

104 The following exchange at the Tribunal hearing is relevant to the Tribunal’s compliance, or purported compliance, with s 359AA of the Migration Act:

Tribunal member:	I’m now going to put some evidence to you where I have some concerns because the responses I heard were inconsistent. And I’ll give you a chance to explain the inconsistencies. But I have to put this to you in a very formal legal way because that’s what I’m required to do under the Migration Act. Okay so excuse the language I am going to use which is very formal now. So ah this ah inconsistency could be the reason or part of the reason that I affirm the department’s decision. And when I put the information to
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you I'm going to give you a chance to comment or respond to the information. Now when I put the information to you ah you need to know that you don't have to respond straight away you can take additional time to do so.

...

When I asked [Ms Gula] where you and Mary met she said you met here.

Sponsor: I didn't mean to ... I said Ohrid first-

Tribunal member: I'm sorry-I'm sorry. Thank you for that. I'm-you're not to interrupt. Okay? Because you will have to leave the room. Okay. We were interrupted by your wife. Go ahead.

Applicant: We met in Ohrid. In the old part of Ohrid. And the name of the restaurant is Chinar. All the travellers from around the world get together and go to the restaurant.

Tribunal member: Okay. I just asked you a different question. I asked you why Ms Gula said you met in Australia.

Applicant: Because we've never actually conversed about our situation so... we were more discussing about relatives overseas. Rather than our personal-but they were very happy when we invited them to the wedding.

Did the Tribunal fail to comply with the requirements of s 359AA of the Migration Act?

105 The applicant submitted that the Tribunal correctly recognised that the evidence of Gula as to where the applicant and sponsor met engaged the obligation in s 359A. However, it did not discharge this obligation because, in two respects, it failed to comply with s 359AA:

- (c) First, the Tribunal failed to give clear particulars of the relevant evidence, as required by s 359AA(1)(a). The particulars of the information given to the applicant was that Gula said the applicant and sponsor met in Australia, whereas the correct statement is that Gula initially said that the couple met in Australia, but then said she did not really know where they met.
- (d) Second, the Tribunal made no attempt at all to explain why Gula's evidence on the issue was relevant to the review, as required by s 359AA(1)(b)(ii).

106 The applicant accepted, based on *SZMTJ v Minister for Immigration and Citizenship (No 2)* (2009) 232 FCR 282; [2009] FCA 486 at [52], that the degree of clarity required in particularising information and explaining the relevance of the information to the review may depend on the context and the information in question. However, the applicant submitted that in the present case the information was not accurately particularised and its relevance to the review was not obvious. The need for accurate particularisation was heightened in circumstances where the applicant was assisted by an interpreter during the hearing.

107 The applicant submitted that the error is material because the breach deprived the applicant of an opportunity to make submissions on matters considered relevant by the Tribunal.

108 The Minister submitted that even if the Tribunal did not fully comply with s 359AA, this would not constitute jurisdictional error, relying on *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415; [2009] FCAFC 46 (*SZMCD*) at [2] (Moore J), [74]-[75] (Tracey and Foster JJ). This is because ‘information’ for the purposes of ss 359A and 424A of the Migration Act concerns evidentiary material and not ‘the existence of doubts, inconsistencies or the absence of evidence’: *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1; [2007] HCA 26 (*SZBYR*) at [18]. Further, ‘information’ must contain in its ‘terms a rejection, denial or undermining of the [applicant’s] claims’ to satisfy the criteria for the grant of the visa: *SZBYR* at [18]; *Springs v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 389 ALR 431; [2021] FCA 197 (*Springs*) at [19]-[28]. Gula’s evidence that the applicant and sponsor met in Australia did not independently and of itself bear on the applicant’s satisfaction of the criterion in cl 820.211(2)(a) and 820.221.

109 In any event, the Minister submitted that the Tribunal did not fail to comply with s 359AA(1) (a) or (b)(i) because:

- (e) The Tribunal gave clear particulars of that part of Ms Gula’s evidence that it regarded as potentially adverse, consistent with the obligation (if it arose) to give ‘clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review’.
- (f) The Tribunal explained the relevance of the information as being its inconsistency with other evidence.

110 The Minister further submitted that any technical non-compliance with s 359AA is not material.

111 Based on the parties' submissions, three issues arise for the Court's consideration in relation to this ground:

(jj) Was the obligation in s 359A or s 359AA of the Migration Act enlivened?

(kk) If so, did the Tribunal:

(i) fail to give clear particulars of the evidence; and/or

(ii) fail to explain to the applicant why the information was relevant to the review?

(ll) If so, was the Tribunal's failure to comply with s 359AA of the Migration Act material?

112 I address each of these issues in turn.

Was the obligation in ss 359A or 359AA of the Migration Act enlivened?

113 The key issue in relation to whether the obligation in ss 359A or 359AA of the Migration Act was enlivened relates to whether Gula's evidence amounts to 'information' for the purposes of those sections.

114 The High Court considered what amounts to 'information' for the purposes of s 424A of the Migration Act, which is similar to s 359A, in *SZBYR*. At [17] and [18], the High Court said (emphasis added):

17. Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review". The statutory criterion does not, for example, turn on "the reasoning process of the Tribunal", or "the Tribunal's published reasons". **The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place.** The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance - and independently - of the Tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, **it is difficult to see why the relevant passages in the appellants' statutory declaration would itself be "information that the Tribunal considers would be the reason, or a**

part of the reason, for affirming the decision that is under review”. Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellants’ claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

18. Thirdly and conversely, if the reason why the Tribunal affirmed the decision under review was the Tribunal’s disbelief of the appellants’ evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting “information” within the meaning of par (a) of s 424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellants’ evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute “information”. Finn and Stone JJ correctly observed in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* that the word “information”.

“does not encompass the tribunal’s subjective appraisals, thought processes or determinations ... nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc”.

If the contrary were true, s 424A would in effect oblige the Tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. **However broadly “information” be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant “information” was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.**

115 The Federal Court (Perram J) considered *SZBYR* in *Springs* and said at [19]-[28] (emphasis added):

- 19 As to the first issue, ‘information’ is not defined in the Act. However, it is established in relation to provisions in identical terms to s 359A(1) that in order for a matter which comes to the attention of the Tribunal to be information to which the provision applies:

- (1) it is necessary that it should contain *in its terms* a ‘rejection, denial or undermining’ of an applicant’s claims to be entitled to the grant of the visa; and
- (2) the claims were to be understood as the criteria for the visa being sought.

See *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190 (*‘SZBYR’*) at 1195 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, considering the operation of s 424A of the Act.

- 20 In this case, therefore, **what must be shown is that Ms Taylor’s evidence that she was not familiar with Mr Springs involves *in its terms* a ‘rejection, denial or undermining’ of the criterion that Mr Springs should have an**

internationally recognised record of exceptional and outstanding achievement in the arts. The literal form of that evidence is that Ms Taylor was not familiar with Mr Springs until she met him.

21 **The nub of the issue is whether this evidence involved *in its terms* an undermining of Mr Springs' claim that he satisfied that criterion.** The primary judge did not think that Ms Taylor's evidence had this quality. Effectively, his Honour reasoned that Ms Taylor's evidence only became relevant to the criterion once there was added an additional integer of reasoning....

22 The additional integer was, therefore, the if-then statement that if Ms Taylor was not familiar with Mr Springs then Mr Springs could not have an internationally recognised record of the requisite kind. If R stands for the proposition that Mr Springs had an internationally recognised record satisfying the criterion, and F stands for the proposition that Ms Taylor was familiar with Mr Springs then, using ~ to represent negation, the argument was as follows:

Proposition 1: ~F

Proposition 2: If ~F then ~R

Deduction: ~R

23 In the primary judge's view, the fact that ~F did not bear directly on the criterion but required the additional reasoning inherent in Proposition 2, meant that ~F did not involve *in its terms* a 'rejection, denial or undermining' of R. I agree that it did not involve, in its terms, a rejection or denial of R.

24 However, the question of whether it involved an undermining of R is more complex but nevertheless informed by the High Court's requirement that the undermining be *in its terms*. As I have said, the evidence only undermined the criterion if one accepts that Ms Taylor's unfamiliarity with Mr Springs implied that he did not have an internationally recognised record (Proposition 2). On balance, and not without some considerable hesitation, I am driven to the conclusion that the primary judge's reasoning is the inevitable consequence of *SZBYR*. The evidence of Ms Taylor did not *in its terms* undermine Mr Springs' application unless and until the Tribunal engaged with Proposition 2. Without Proposition 2 her evidence did not bear upon the eligibility criterion.

25 This outcome might give one pause to consider whether *SZBYR* is a sensible decision, however, it directly governs this appeal and my views on its soundness are irrelevant. For completeness, however, I would record that I have some difficulty with the reasoning in *SZBYR*: the word 'criteria' does not appear in the provision (although the High Court placed much emphasis upon it) and the idea that the information must go *in its terms* (ie explicitly) to the criteria (which it does not mention) seems very difficult to reconcile with the words which the provision does use: 'or a part of the reason'. These words explicitly accept that the information need not resolve the review application in its entirety. If the information need not resolve the application in its entirety this rather suggests that the concept of information must include integers of evidence conceptually below the level of a visa criterion. If information can only go 'in its terms' to the visa criterion then in what circumstances could the information ever be such as to be only 'a part of the reason' for affirming the decision under review? It would always be *all* of

the reason. The reasoning in *SZBYR* therefore seems to proceed by reference to a word which does not appear in the provision and to ignore words which do.

26 It also seems to lead to an operation for the provision which is both arbitrary and emasculating. For example, the result of *SZBYR* in this case is that Ms Taylor's evidence that she had not previously heard of Mr Springs is not information so that he need not be given a chance to comment on it. But if, instead, her evidence was that she did not think he had an internationally recognised record this would be information and he would be entitled to be heard on it. Where is the sense in this? In the domain of refugee law, the result is more idiosyncratic. If the Tribunal receives evidence to the effect that a protection visa applicant is not a member of a claimed religious group (for example, a Twelver Shia Muslim) then this is information which the protection visa applicant must be heard on. What shall he say? It is difficult to see that the submission would be any more than 'No I am'. But if the evidence is that the protection visa applicant does not pray on a *turbah* (which the Twelver Shia do but others, such as the Sunni do not) this is not information and the applicant need not be given an opportunity to be heard on it. The fact that he might have said something useful like 'I have a sore knee which prevents me using a *turbah*' would never come to light.

27 The Tribunal is then entitled to reason that because the applicant does not pray on a *turbah* he is not a Twelver Shia Muslim without giving the visa applicant an opportunity to be heard on the matter. This is because this evidence does not 'in its terms contain a "rejection, denial or undermining" of the review applicant's claim to be a refugee': *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31; 238 CLR 507 ('*SZLFX*') at [22] per the Court. This is not only unfair on the visa applicant it also makes for substandard decision making from an instrumental perspective. By keeping this kind of material out of the review process the risk of the wrong decision being made is greatly enhanced. I struggle to grasp the rationality of such an outcome, particularly where the text of the provision appears not to require it.

28 However, the High Court has spoken. Ms Taylor's evidence was not information for the purposes of s 359A(1)(a). The primary judge did not err therefore in reaching the same conclusion.

116 I have taken into account the reasoning in both *SZBYR* and *Springs* in reaching my conclusion in this case. The 'information' that Gula said the applicant and the sponsor met in Australia was information that, in its terms, directly contradicts the *evidence* of the applicant and the sponsor that they met in Macedonia. It relates to the existence of evidentiary material or documentation and not merely the existence of doubts, inconsistencies or the absence of evidence.

117 However, it is not apparent that the information, in its terms, directly contradicts the *claim* of the applicant to be the spouse of the sponsor for the purposes of s 5F of the Migration Act and the criteria in cl 820.211(2)(a) and 820.221. Applying the reasoning of Perram J in *Springs*, it would seem in the present case that the information that Gula said the applicant and the sponsor met in Australia does not, in its terms and without some further inferences or

deductions made by the Tribunal, contradict the criterion that required the applicant to be the spouse of the sponsor within the meaning of s 5F of the Migration Act, or even any of the matters that the Tribunal was required by reg 1.15A to take into account in forming a view on that question. If I apply the reasoning of the High Court in *SZBYR* and Perram J in *Springs*, as I believe I must, then it follows that the information that Gula said the applicant and the sponsor met in Australia is not ‘information’ that the enlivened the obligation in s 359A of the Migration Act.

118 It follows that the applicant is unable to succeed on this ground, even if there were defects in how the information was provided to the applicant.

119 I reach this conclusion with great reluctance and it seems to be to be an unpalatable outcome. This is particularly so in circumstances where the purpose of the similarly worded s 424A of the Migration Act was described in *SZMCD* at [71] as being to compel the Tribunal:

- (a) To put the visa applicant on fair notice in writing of critical matters of concern to the Tribunal;
- (b) To ensure that the visa applicant understands the significance of those matters to the decision under review; and
- (c) To give the applicant a reasonable opportunity to comment on or to respond to those matters of concern.

120 The evidence that Gula said the applicant and the sponsor met in Australia was clearly a matter of critical concern to the Tribunal, and its significance to the review is not obvious. It does not sit comfortably with me to find that the Tribunal was not required to put the applicant in a position where he could understand the significance of the information and to invite the applicant to comment on the information. The practical unfairness in the present case appears to be heightened by the lack of obvious relevance of the information to the statutory criteria, which I have referred to in my consideration of ground 3. However, in the light of the manner in which the High Court interpreted s 424A in *SZBYR* and how Perram J considered that should be applied in *Springs*, any finding that a different approach is required needs to be made by a higher court.

121 In the event that the above analysis is subsequently found to be wrong, I set out below the findings that I would make if the obligation in s 359A is enlivened.

Did the Tribunal fail to comply with the requirements of s 359AA of the Migration Act?

- 122 If the obligation in s 359A or s 359AA was enlivened, then I would find that the Tribunal failed to comply with the obligation.
- 123 I accept the Minister's submission that the Tribunal gave 'clear particulars' of the information. The information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review was that Gula said the applicant and the sponsor met in Australia. This was sufficiently clear on its face.
- 124 I acknowledge that the Tribunal did not also refer to Gula's subsequent evidence that she did not know where the applicant and the sponsor met. While it may have been preferable for the Tribunal to refer to this evidence when inviting the applicant to comment, it was a qualification or inconsistency in her evidence and was not on its face part of the information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review.
- 125 I do not, however, accept that the Tribunal explained to the applicant why the information was relevant to the review. The Minister relies on the Tribunal's comment that 'the responses I heard were inconsistent' as amounting to a sufficient explanation as to why the information is relevant. This explanation itself does nothing to put the applicant in a position to understand why the information is relevant to the review, or the consequences of it being relied on in affirming the decision under review. While the Tribunal was not required to disclose its thought processes to the applicant, it was required to offer some explanation to the applicant about why Gula's information that the applicant and the sponsor met in Australia was relevant to the review beyond simply stating that it is inconsistent, and it was required to make some effort to explain the consequence of the information being relied upon.

Materiality

- 126 I would also find that the Tribunal's failure properly comply with the requirements of s 359A of the Migration Act, if enlivened, was material. The threshold to establish materiality in the case of a failure to afford an applicant procedural fairness is 'undemanding'. As the High Court (Kiefel CJ, Keane and Gleeson JJ) explained in *Nathanson v Minister for Home Affairs* (2022) 178 ALD 536; [2022] HCA 26, at [32]-[33] (emphasis added):

32. As explained in *MZAPC [v Minister for Immigration and Border Protection]* (2021) 273 CLR 506; [2021] HCA 17 (*MZAPC*), the materiality of a breach requires consideration of “the basal factual question of how the decision that was in fact made was in fact made”. This question is determined by proof of historical facts on the balance of probabilities. Then, **it is necessary to consider whether the decision that was in fact made could have been different had the relevant condition been complied with “as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined”**. The burden falls on the plaintiff to prove “on the balance of probabilities the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision *could* have been made had there been compliance with that condition”.
33. **There will generally be a realistic possibility that a decision-making process could have resulted in a different outcome if a party was denied an opportunity to present evidence or make submissions on an issue that required consideration. The standard of “reasonable conjecture” is undemanding.** It recognises that a fundamental purpose of affording procedural fairness is to afford an opportunity to raise relevant matters which are not already obvious, or not liable to be advanced by the apparently persuasive “story” of the opposing party. **Where a Tribunal errs by denying a party a reasonable opportunity to present their case, “reasonable conjecture” does not require demonstration of how that party might have taken advantage of that lost opportunity.** Nothing said in *MZAPC* denies this. To the contrary, the standard of “reasonable conjecture”, correctly applied, proceeds on assumptions that are derived from the rationale for procedural fairness, namely that, if given a fair opportunity to present their case, a party will take advantage of that opportunity and that, by doing so, the party could achieve a favourable outcome.

127 The Tribunal’s failure to explain to the applicant the relevance of the information to the review and the consequences of it being relied on denied the applicant a meaningful opportunity to respond to or make submissions on the information that the Tribunal considered to be relevant to the outcome of the review.

Conclusion in relation to ground 4

128 Ground 4 fails because, on my interpretation of *SZBYL* and *Springs*, the information that Gula gave evidence that the applicant and the sponsor met in Australia is not information that, in its terms, contradicts the applicant’s claim to be the spouse of the sponsor. However, if I am found to be wrong in that finding, then I would accept that the Tribunal failed to comply with the requirements of s 359AA of the Migration Act and this failure was material.

CONCLUSION

129 I have found that two of the applicant’s grounds establish jurisdictional error in the Tribunal decision. The judicial review application therefore succeeds and I issue writs of certiorari to

quash the Tribunal decision and mandamus to require the Tribunal to reconsider the application for review of the delegate's decision.

I certify that the preceding one hundred and twenty-nine (129) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Ladhams.

Associate:

Dated: 9 February 2024